Supreme Court, U.S.
FILED
DEC 2 0 1999

No. 99-937

In The

Supreme Court of the United States

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

ART HUTTINGER and DONNA HUTTINGER,

Respondents.

MOTEL 6 OPERATING L.P. and
ACCOR ECONOMY LODGING, INC.,

Petitioners,

v.

JAMES FENNERN and DELORES FENNERN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in two fact-intensive age discrimination cases, the Ninth Circuit Court of Appeals correctly reinstated jury verdicts in favor of plaintiffs, where there was substantial competent evidence in each case to support the jury's verdict that the proffered reasons for discharge were pretextual and where, in *Fennern*, there was direct evidence of Motel 6's discriminatory intent.

2. Whether the Court of Appeals properly accepted an interlocutory appeal under 28 U.S.C. § 1292(b) where the district court certified the appeal, where the Court of Appeals has discretion to accept or reject the appeal, and where Motel 6 failed to raise the jurisdictional issue before the Ninth Circuit panel.

3. Whether the Ninth Circuit acted correctly in reversing the district court's grant of a new trial based on improper consolidation, where the Court of Appeals correctly applied an abuse of discretion standard, and where Motel 6 failed to preserve the issue for appeal by timely moving for separation of the trials.

STATEMENT AS TO PARTIES

Pursuant to Supreme Court Rule 29.6, all parties are set forth in the caption.

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

These are disparate treatment age discrimination cases. The Fennerns sued Motel 6 under the Age Discrimination in Employment Act, 28 U.S.C. § 621, *et seq.* and the Idaho Human Rights Act, Idaho Code § 67-5901, *et seq.* The Huttingers sued Motel 6 under the Idaho Human Rights Act. Plaintiffs sought back pay, front pay and exemplary damages.

B. COURSE OF PROCEEDINGS IN THE DISTRICT COURT.

1. ***Fennern v. Motel 6.*** On January 18, 1994 Motel 6 fired the Fennerns as the management team of the Idaho Falls motel and replaced them with a substantially younger and less experienced team. The Fennerns complained to the E.E.O.C. on March 8, 1994 and obtained a Notice of Right to Sue on December 12, 1994. They sued Motel 6 on February 1, 1995 in the Seventh Judicial District Court, Bonneville County, Idaho. The Fennerns alleged age discrimination under the ADEA and the Idaho Human Rights Act. Record 14. Motel 6 removed the case to the United States District Court for the District of Idaho on federal question and diversity jurisdiction grounds. Record 1.

2. ***Huttinger v. Motel 6.*** On June 2, 1993 Motel 6 fired the Huttingers as the management team of the Pocatello motel and replaced them with a substantially younger and less experienced team. On May 22, 1995 the Huttingers sued Motel 6 for age discrimination under the

Idaho Human Rights Act, Idaho Code § 67-5901 *et seq.*, in the Sixth Judicial District Court, Bannock County, Idaho. On June 20, 1995 Motel 6 removed the case to the United States District Court for the District of Idaho on the grounds of diversity of citizenship. Record 1.

3. The Consolidated Cases. Motel 6 moved for summary judgment on all issues. The district court denied summary judgment and ordered the cases consolidated for trial. Record 135, 147. Trial began on March 31, 1997. On April 11, 1997 the jury returned a verdict in favor of all plaintiffs, awarding each plaintiff back pay, front pay and exemplary damages. Record 218.

Motel 6 moved for judgment as a matter of law and new trial in both cases. On January 20, 1998 the district court granted Motel 6's motion for judgment as a matter of law in *Huttinger* and in the alternative granted a new trial. The court denied defendant's motion for judgment as a matter of law in *Fennern* but granted a new trial. In both cases the court granted judgment as a matter of law on the issue of willful violation of the ADEA and the Idaho Human Rights Act. Record 250.

On May 13, 1998 the district court granted the Huttingers' motion for Rule 54(b) certification for appeal and the Fennerns' application for certification for appeal, 28 U.S.C. § 1292(b). Record 263. On June 10, 1998 the Ninth Circuit Court of Appeals granted the Fennerns' petition for permission to appeal, 28 U.S.C. § 1292(b). Pet. App. B, p. 15a. The Fennerns and Huttingers timely filed notices of appeal. On July 16, 1998 the Ninth Circuit Court of Appeals consolidated the cases for appeal.

C. COURSE OF PROCEEDINGS BEFORE THE NINTH CIRCUIT COURT OF APPEALS.

On July 6, 1999 the Ninth Circuit Court of Appeals issued its unpublished decision. Pet. App. A, p. 1a. The Ninth Circuit reversed the decision of the district court in both cases and reinstated the jury's verdicts in their entirety. On September 2, 1999 the Ninth Circuit Court of Appeals denied Motel 6's petition for rehearing and rejected the petition for rehearing en banc. Pet. App. E, p. 67a.

II. STATEMENT OF FACTS.

A. *FENNERN V. MOTEL 6*

Motel 6 hired Jim and Delores Fennern as a motel management team in 1980. They managed motels in Cheyenne, Rock Springs, and Jackson, Wyoming, Midvale, Utah, and Boise and Idaho Falls, Idaho. Their performance was always exemplary. They trained other managers, received annual merit pay increases and numerous occupancy awards. Their annual team appraisals always rated them satisfactory or better. They were experienced not only in cleaning up older dirty motels but in opening new motels.

On July 2, 1993 Area Manager Doug Massman transferred the Fennerns from Jackson, Wyoming to Idaho Falls. The Idaho Falls motel was filthy. The Fennerns worked 10 to 14 hours a day, seven days a week to clean the motel up to Motel 6 standards. Although Doug Massman stymied their efforts by refusing to provide adequate

supplies, equipment and staff, the Fennerns made progress.

The Fennerns went on vacation from December 20, 1993 until January 13, 1994. In their absence the motel was run by relief managers. On January 6, 1994 Doug Massman and Regional Vice President Scott Griffith inspected the motel. This inspection was not part of a regular or routine inspection procedure but was entirely unprecedented. The Fennerns' motels had never before been inspected in their absence. Tr. 188-89. Immediately following the inspection Massman and Griffith made their decision to fire the Fennerns. Tr. 1153. They agreed on three reasons for termination: (1) Failure to check references on a new desk clerk; (2) failing the inspection; and (3) using a motel room to store two boxed toilets (a "down room"). Tr. 1153-54. Neither Massman nor Griffith looked at the Fennerns' personnel file (although it was available), nor consulted with the Fennerns' former area manager (although he was still employed at Motel 6 in the same region) before making their termination decision.

On January 18, 1994, shortly after the Fennerns returned from vacation, Massman fired the Fennerns. The Fennerns had no warning that they were about to be fired. Massman did not give the Fennerns an opportunity to counter the charges against them. Delores Fennern asked Doug Massman to specify the reasons for termination. Although Massman and Griffith had, on January 6, 1994, decided on three reasons for termination, Massman now wrote out five reasons. Pl. Exh. 24. The two additional reasons did not arise until January 17, 1994. Tr. 206,

215. Notwithstanding Doug Massman's deposition testimony that at least one of the latter two reasons – Jim Fennern's failure to promptly restore the motel's phone service following an earthquake – was a definite and serious reason for discharge, Tr. 1471-75, he later recanted this testimony at trial and sheepishly admitted that the latter two reasons were not true reasons for discharge. Tr. 1159-64, 1471-78.

The Fennerns offered evidence to prove each of the three proffered reasons was pretextual:

1. Delores Fennern in fact obtained two satisfactory references on the new desk clerk in accordance with Motel 6 policy, one of which was Motel 6 itself. Tr. 182-86.

2. With respect to the "down room," Doug Massman and Regional Maintenance Engineer Robert Patrick had permitted the Fennerns to use the room for storage. Tr. 203, 422, 1932-35. The room was not "down" in any event, as it could be rented by removing the stored items and vacuuming. Tr. 422-23.

3. The failed inspection was due to a number of factors: Lack of time and support to clean up the motel, Tr. 136-59; the relief managers' failure to make sure the rooms were clean, Tr. 189-93, 559; the head housekeeper's failure to inspect Massman's and Griffith's rooms before check in because they arrived early and demanded rooms immediately, Tr. 561-62; and failure of the housekeeper to properly clean the rooms because Massman and Griffith checked in early. This housekeeper admitted that this was not the Fennern's fault. Tr. 1990-92. While the Fennerns were on vacation it was the relief managers' responsibility to see that the rooms were cleaned. Tr. 188-95,

974-76. The rooms were clean when the Fennerns left on vacation. Tr. 191-92. Moreover, Massman stymied the Fennerns' efforts to clean up the motel by failing to provide them with adequate support and equipment. For example, Massman ordered the Fennerns to re-key the motel and move the key room. They requested assistance from a locksmith, but Massman refused. Tr. 137-39. Massman directed the Fennerns to trim the trees and shrubs surrounding the motel. They requested the assistance of a tree service but Massman refused. Tr. 140-41. The motel badly needed repainting, but Massman would not provide paint. Tr. 141-42. The carpets badly needed shampooing but the carpet shampooer was broken. Massman refused to provide a new one. Tr. 144-45. Delores had the staff washing walls and ceilings as part of the deep cleaning process, but Massman told her to stop. Tr. 145-47. Massman refused to provide them the supplies they needed to get the motel up to standards. Tr. 154-55, 519. Massman confirmed all of this under cross-examination. Tr. 1292-1312.

The Fennerns' younger replacements received preferential treatment. Motel 6 gave them more desk clerk hours and an assistant maintenance man. Tr. 515, 1314. This enabled the Shearouses to clean the motel better and faster. Massman gave them a new carpet shampooer, Tr. 516, 1313, which enable them to deep clean rooms faster. Massman told the Fennerns on two occasions, while they were employed at the Idaho Falls motel, that he could replace them with college students. Tr. 180-82, 430. This testimony was unrebutted and unexplained.

Motel 6 replaced the Fennerns with Mike and Loree Shearouse. Jim and Delores were ages 60 and 58 respectively; Mike and Loree Shearouse were ages 35 and 49 respectively on the date of discharge and were less experienced than the Fennerns.

B. *HUTTINGER V. MOTEL 6.*

Motel 6 hired Art and Donna Huttinger as a motel management team on June 28, 1985. They managed the Pocatello motel. Their performance was always exemplary. They trained other managers and received annual merit pay raises. Their area managers agreed that the Huttingers were some of the best managers they had. Tr. 629-32, 983-84, Pl. Exh. 52. In April 1993, Area Manager Joseph Demarest thoroughly inspected the Huttingers' motel. They passed with flying colors. Demarest told them that although no one was supposed to get a "4" (on a 1-5 grading scale), he was going to give them a "4." Tr. 647-51, 1005-06. Regional Vice President Scott Griffith inspected the Huttingers' motel in February, 1993. He also gave them a "4." Tr. 632-40, D. Exh. 221.

On May 13, 1993 Doug Massman, the new area manager, inspected the Pocatello motel. He claims he found numerous key and security policy violations. However, he disclosed none of the claimed violations to the Huttingers, and the "action sheet" he prepared listed no violations. Tr. 652-64, Pl. Exh. 53. While at the motel Massman claims he heard from an unidentified desk clerk that the Huttingers were discriminating against Native Americans and using staff to work on their motor home, Tr. 1049-51, 1251-52, but he would lend such charges no

credence, nor even discuss them with the Huttingers, without written confirmation. Tr. 1224-27. When Massman left the motel the Huttingers had no idea that they were in violation of any Motel 6 policies. Tr. 663-64, 692, 819.

The Huttingers went on vacation on May 22, 1993. In their absence relief managers Jim and Aileen Malone took over the motel. Aileen Malone called Massman and told him of staff unrest and complaints about the Huttingers. Tr. 1060-61. Massman told her to have the staff write out their complaints, Tr. 1062, as he would lend them no credence unless they were in writing.

On May 25, 1993 Doug Massman met Scott Griffith in Phoenix to discuss the Huttingers. Tr. 929, 1237-39, D. Exh. 254. On that day they decided to fire the Huttingers for discriminating against Native Americans and for violating the security key policy. Tr. 928. Doug Massman had no documentary proof of the alleged violations at this meeting. Tr. 929-30, 1238.

Massman returned to the motel on May 27. Tr. 1063-71. He inspected the motel and prepared an action sheet listing key and security policy violations. Tr. 1219-20, Pl. Exh. 97. He met with the staff and solicited complaint letters against the Huttingers. Tr. 1067-71, 1254-56. Aileen Malone searched Donna Huttinger's personal files and found a memorandum which required desk clerks to subject Native American guests to close scrutiny on check in. Tr. 617, 689-90, 1071-72, D. Exh. 217. (The Huttingers stopped using this memorandum in 1990 when so directed by their area manager, Tr. 607-17.)

The Huttingers returned from vacation on June 2, 1993. Tr. 665. Massman called them in to a meeting and fired them. Tr. 673-76. Massman told the Huttingers he was firing them for discriminating against Native Americans and for violating the security key policy. Tr. 677-79; 689; Pl. Exhs. 75, p. 5; 99 and 254. He explicitly stated that there were no other reasons for discharge. Pl. Exh. 75 p. 5. The Huttingers had no warning of the discharge and no opportunity to respond to the charges against them. Tr. 675, 689, 816.

The Huttingers presented evidence at trial that the reasons for discharge were pretextual. They denied discriminating against Native Americans, Tr. 607-27; 803-05, and presented substantial evidence – including the testimony of former area manager Joseph Demarest – that their motel was in complete compliance with Motel 6's security policy. Tr. 632-36; 647-51; 984-98 and 1006.

At trial Motel 6 proffered additional reasons for discharge, including discrimination against *locals* (as opposed to Native Americans) in renting rooms, Tr. 1750-62, D. Exhs. 218 and 253, staff unrest, Tr. 1088-89 and D. Exh. 253, moldy bathrooms, Tr. 1408-09, 1755-56, staff working on the Huttingers' motor home, Tr. 1756, and untrimmed shrubs, Tr. 1075-79 and D. Exh. 253.

As in the termination of the Fennerns, neither Massman nor Griffith reviewed the Huttingers' personnel file (although it was available to them) nor discussed the Huttingers with their former area manager Joseph Demarest (although he was still working at Motel 6 in the same region) before making their termination decision;

nor did they apprise the Huttingers of the claimed violations prior to termination nor give the Huttingers any opportunity to respond.

At the time of discharge Art and Donna Huttinger were 68 and 55 years of age. Their replacements Jim and Aileen Malone were 45 and 43 years of age and were much less experienced than the Huttingers. Tr. 2057-58, 702-03.

III. MOTEL 6'S MISSTATEMENTS OF FACT AND FACTUAL OMISSIONS

Just as it did before the Ninth Circuit, Motel 6 here asserts that the facts as found by the district court [Pet. App. D] are the undisputed facts in this case. Motel 6 seldom cites to the record; rather, Motel 6 consistently cites to the district court's opinion to support its statement of facts. Motel 6 ignores facts which support plaintiffs' claims. Indeed, this was the gravamen of the appeal to the Ninth Circuit: whether or not there was substantial evidence in the record to support the jury's verdicts, notwithstanding the trial judge's interpretation of the record. Inasmuch as these are fact driven cases, it is imperative to point out the misrepresentations of fact and factual omissions in Motel 6's petition.

At page 3 of the petition Motel 6 misrepresents the status of the motel manager and assistant manager, stating: "The manager had the principal responsibility for the motel." At page 11 Motel 6 asserts that the motel manager was solely responsible for running the motel and the assistant manager was little more than a desk clerk. These assertions are false and unsupported by the record. The

Fennerns and Huttingers were hired as management teams. Tr. 61, 88-92, 382-83, 597. Motel 6 allowed them to choose who would be the manager and who the assistant manager. *Id.* Jim Fennern was originally a manager and paid a salary, while Delores was the assistant manager and was paid minimum wage. Tr. 88-92. They later switched. Tr. 382-83. Donna Huttinger started out as the assistant manager and later became the manager. Tr. 592. The assistant managers performed all of the duties of the managers. Tr. 389, 597. Motel 6 fired plaintiffs as motel management teams and replaced them with motel management teams. Tr. 1837-38.

Motel 6 argues here, as it did before the Ninth Circuit, that for purposes of determining discriminatory animus, only the ages of the managers – Delores Fennern and Donna Huttinger – and their replacements should be compared (there being a lesser disparity in ages) and the ages of the assistant managers – Jim Fennern and Art Huttinger – and their replacements should be ignored (there being a much greater disparity in ages). Motel 6 claims that this should be so because the manager, not the assistant, was responsible for the motel's management. This convenient argument ignores one salient fact, which was not lost upon the Ninth Circuit: the assistant managers ended up just as fired as the managers, regardless of how managerial responsibility was allocated.

At page 5 Motel 6 states: "The Huttingers were discharged for: (1) discrimination against Native Americans; (2) violations of Motel 6's safety and security policies; and (3) widespread employee complaints." This statement is incorrect. When Massman fired the Huttingers immediately after their return from vacation, he told

them there were only two reasons for termination: Failure to follow the security key policy, and discrimination against Native American guests. *See* Pl. Exh. 75. He specifically told them there were no other reasons for discharge. *Id.* At trial Motel 6 asserted additional reasons for discharge: Staff unrest, use of staff to work on the Huttingers' motor home, failure to trim shrubs, and failure to solve a mold problem in one of the bathrooms. Tr. 1749-62, 1084-1089, 1261-66 and D. Exh. 253. These reasons for discharge were never disclosed to the Huttingers before litigation began. Tr. 688-89. Motel 6 was at no time consistent in its reasons for discharge, first telling the Huttingers one thing; then stating another thing in internal documents; and finally asserting yet another constellation of reasons for discharge at trial.

At page 5 Motel 6 states:

> While the Huttingers were on vacation, the relief manager at the motel the Huttingers managed, Aileen Malone, contacted area manager Massman concerning Malone's discovery that the Huttingers were discriminating against Native Americans. (App., *infra*, 46a, 48a). Massman initially discussed the matter with Regional Vice President Griffith. Tr. 1079. Griffith directed Massman to go immediately to the Huttingers' motel and conduct an investigation. *Id.*

This is incorrect. Aileen Malone told Massman of staff unrest and complaints about the Huttingers. Tr. 1060-61. Massman claims that he heard about discrimination against Native Americans on his first visit to the motel on May 13, 1993 but would lend the charge no credence until he had documentary proof. Tr. 1049-51, 1224-27 and

1251-52. Massman did not "immediately" go to the Huttingers' motel to investigate. Rather, on May 25, 1993 Massman and Griffith met in Phoenix to discuss the Huttingers. Tr. 929, 1237-39 and D. Exh. 254. They decided to fire the Huttingers for discriminating against Native Americans and for violating the security key policy. Massman had no documentary proof of the alleged violations at this meeting. Tr. 929-30, 1238. Thereafter Massman returned to the motel on May 27, 1993 and obtained documents to support the termination decision by soliciting complaint letters against the Huttingers from staff, Tr. 1067-71, 1254-56, and by searching Donna Huttinger's personal files to discover a discriminatory memorandum (which the Huttingers had ceased using in 1990). Tr. 1071-72, 617, 689-90 and 607-17, D. Exh. 217.

At page 6 Motel 6 states: "The district court found that the Huttingers did not rebut record evidence that their memoranda for desk clerks that discriminated against Native Americans was still in effect three years after their previous area manager, Bob Williams, instructed them to cease using it." This is a factual error on the part of the district court. Donna Huttinger testified that they stopped using this memorandum in 1990 when so directed by their area manager. Tr. 607-17. She further testified that Aileen Malone could only have found a copy of this memorandum by searching through her personal files. Tr. 1071-72, 617, 689-90.

At page 7 Motel 6 states: "The district court observed that Malone and Jensen were not employed by Motel 6 at the time of the trial and were thus disinterested witnesses." Again this was error on the part of the district

court. The jury was free to reject Teresa Jensen's testimony as she clearly had her own agenda. She felt Donna Huttinger had abused her and was using the trial to exact a measure of revenge. Tr. 1623. Moreover, Aileen Malone was not a disinterested witness because she was interested in relocating to Idaho and taking over the Huttingers' Pocatello motel. Pet. App. A, p. 9a, Tr. 1417-18.

At page 8 Motel 6 asserts that the Huttingers acknowledged a violation of the security key policy by failure to utilize "blue tags." Motel 6 omits to mention that prior to the termination, Scott Griffith stated that the status of the blue key tags was "OK," Tr. 1849-50, D. Exh. 221; that Massman listed no key policy violations following his inspection of May 13, 1993, Tr. 658-64 and 819, Pl. Exh. 53; omits to state that one month prior to Massman's May 13 inspection, former area manager Joseph Demarest thoroughly inspected the motel's adherence to the key and security policy and passed the motel with flying colors, Tr. 647-51, 1005-06; ignores the fact that the blue key tags had absolutely nothing to do with motel security, Tr. 807-12; 1039-40; 1277-1280; and ignores the fact that, regardless of whether the Huttingers were using the blue key tags they were, according to Doug Massman, doing exactly what they were supposed to do with respect to the motel's keys. Tr. 1280. The jury could have thus concluded that the "blue key tags violation" was a trumped up reason, insufficient to warrant discharge.

At page 8 Motel 6 states: "Judge Winmill observed that Art Huttinger did not dispute that he had ordered Motel 6 employees to work on the Huttingers' personal motor home." Motel 6 omits to state that Doug Massman specifically stated that he was not relying upon this as

grounds for discharge. Pl. Exh. 75, p. 5. Motel 6 did not assert this as a grounds for discharge until trial. (Motel 6 did not assert an after-acquired evidence defense in either case.)

At page 9 Motel 6 states: "Six months later, *as part of their regular inspection program*, Massman and Griffith inspected the Fennerns' motel while the Fennerns were on vacation." (Emphasis added.) This is false. This inspection was unprecedented; the Fennerns' motels had never before been inspected in their absence. Tr. 188-89. In any event the portion of the transcript to which Motel 6 cites (Tr. 1135) does not state that this inspection was part of the Motel 6 regular inspection program.

At pages 9 and 10 Motel 6 discusses the inspection which took place on January 6, 1994 in the Fennerns' absence. Motel 6 fails to state that Massman and Griffith made their decision to terminate the Fennerns on January 6, 1994, without consulting the Fennerns. Tr. 1153.

At page 10 Motel 6 states: "The Fennerns were discharged for (1) failing a motel inspection; (2) improperly checking references before hiring a desk clerk; and (3) leaving for vacation with Room 114 at their motel 'down' (unrentable)." Motel 6 fails to disclose that when Massman told the Fennerns they were fired, he gave them *five* reasons for discharge. Pl. Exh. 24. The two additional reasons for discharge did not arise until January 17, 1994. Tr. 206, 215. Notwithstanding Massman's deposition testimony that at least one of the latter two reasons was a definite and serious reason for discharge, Tr. 1471-75, he recanted at trial and admitted that the latter two reasons were false. Tr. 1159-64, 1471-78.

At page 10 Motel 6 states: "Loree Shearouse, who succeeded Delores Fennern as manager, thoroughly cleaned the motel in six months, despite her lack of experience." This statement is false. It took Loree Shearouse a full year to clean the motel. Tr. 1321-26. Motel 6 gave the Shearouses staff and equipment to assist them which Motel 6 did not give to the Fennerns. Tr. 515-16, 1313-14. Most importantly, the Shearouses were standing on the Fennerns' shoulders, and took advantage of the Fennerns' six month, 10 to 14 hours a day, 7 days per week effort to clean the motel.

At page 10 n.7, Motel 6 asserts that the only direct evidence of discriminatory intent was Massman's statement that he could replace the Fennerns with college students at a lower wage. Motel 6 asserts that Jim Fennern admitted the statements were made at least six months before discharge. This assertion is a half truth. Delores Fennern testified that in October 1993, three months prior to discharge, Massman twice said that he could replace them with college students. Tr. 180-82, 430. Massman never denied or explained the statement. The district court ignored this testimony, as does Motel 6.

At page 11 Motel 6 states that plaintiffs had represented to the court that they would put on evidence of a pattern and practice of age discrimination. "On that basis, the district court permitted consolidation." The district court at no time prior to trial stated that this was the basis for the court's decision to consolidate. To the contrary, the district court stated, citing *Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995): "It appears that evidence of age discrimination against other Motel 6 employees, including the Fennerns, is relevant to the issue of the motive or

intent behind the Huttingers' termination." Record 135 p. 18, Record 147 p. 21.

At page 12 Motel 6 correctly states: "Later, just before trial, plaintiffs announced that they did not intend to introduce pattern and practice evidence." Motel 6 omits to state that at that juncture, Motel 6 failed to move to separate the trials. Tr. 49-53.

At page 12 Motel 6 correctly states: "In their closing argument to the jury, however, the plaintiffs contended that the two cases presented the same pattern of Motel 6 conduct." Plaintiffs did in fact argue that there was a pattern of conduct on the part of Motel 6:

- Plaintiffs were older motel management teams;
- Plaintiffs were long term employees with excellent work records;
- The same decision makers were involved in each termination;
- The decision makers waited until plaintiffs were on vacation and furtively inspected their motels in their absence;
- The decision makers, both of whom were new to the region, did not bother to look at plaintiffs' personnel files, nor consult with plaintiffs' former area manager, before making their termination decisions;
- Plaintiffs had no prior warnings of any violations or that they were about to be terminated. Plaintiffs had no opportunity to respond to the charges against them;

- Motel 6 used shifting and pretextual reasons in each case to justify its termination decision;

- Motel 6 replaced plaintiffs with substantially younger, less experienced and lower paid management teams;

- The district count recognized that the only difference in the cases was the pretextual reasons for discharge, *See* Pet. App. D, p. 38a: "The only area in which the Fennern and the Huttinger cases significantly differ is in Motel 6's proffered reasons for discharge."[1]

Plaintiffs at no time argued that there was a "pattern and practice" of discrimination at Motel 6. "Pattern and practice" is a term of art describing a theory of proof in a disparate treatment case. It is in essence an allegation that discrimination is the employer's standard operating procedure. *See, e.g., Hazelwood School District v. United States,* 433 U.S. 299 (1977).

At page 12 Motel 6 asserts "Upon learning that the plaintiffs abandoned their pattern and practice case, the district court refused to permit Motel 6 to introduce statistical evidence on its hiring and discharge patterns to

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[1] The district court later said: "The similarities regarding the age differential of the plaintiffs and their replacements, the temporal proximity of the firings, and the fact that the firing occurred subsequent to the plaintiffs' vacations pale by comparison to the substantial differences in the reasons for discharge proffered by Motel 6." Pet. App. D, p. 63a. The Court of Appeals gave this reasoning no credence whatsoever. Did the district court really expect Motel 6 to use the same reasons for terminating both the Fennerns and the Huttingers?

demonstrate there was no statistical support for any practice of age discrimination." This is a misstatement of the record. Motel 6 voluntarily withdrew its statistical evidence, Tr. 49-53, and at no time offered this evidence during the course of trial nor made an offer of proof.

IV. WHY THE PETITION FOR WRIT OF CERTIORARI OUGHT NOT BE GRANTED.

A. MOTEL 6 ASKS THIS COURT TO REVIEW FACTUAL FINDINGS.

Supreme Court Rule 10 states in part: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The basis for Motel 6's petition is the assertion that the district court's factual findings are entirely correct and that the Ninth Circuit's factual findings are entirely incorrect. Motel 6 asserts now, as it has throughout the appellate process, that the district court's factual findings are unimpeachable. This, of course, was the primary issue on appeal – were the district court's factual findings supported by the record. The Ninth Circuit Court of Appeals concluded that there were numerous facts in the record which the district court either ignored, or upon which it was simply mistaken, and that there was ample evidence in each case to support the jury's verdict.

A review of Motel 6's petition reveals that the ostensible "split in the circuits" on the "pretext plus" issue (see discussion below) is merely a ploy to induce this Court to review purely factual issues. After identifying the split in

the circuits on the "pretext plus" issue of law, the petition states:

> In the instant case, the Ninth Circuit reversed the district court's ruling granting JAML (and a conditional new trial) in *Huttinger*, and a new trial in *Fennern*, **despite that the evidence in the record showed that Motel 6's reasons for discharging the Huttingers and Fennerns were not pretextual** and in the absence of direct evidence that Motel 6 was motivated to discharge the Huttingers because of their age.

Petition for a Writ of Certiorari, p. 15 (emphasis added). The remainder of the petition is nothing more than Motel 6's rehashing of the evidence and Motel 6's repeated claims that the evidence did not support the jury's disbelief of the proffered reasons for discharge. *Id.* at 16-17. In short, were this Court to grant the petition, it would be presented with nothing more than a review of the factual record, not any significant legal issues.

B. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT.

Motel 6 asserts that the Ninth Circuit Court of Appeal's decision is contrary to decisions of this Court, in that the Ninth Circuit should have affirmed judgment as a matter of law where there was no direct evidence that defendant was motivated to discriminate against plaintiffs because of age. The Ninth Circuit Court of Appeals followed this Court's holding in *St. Mary's Honor Center v.*

Hicks, 509 U.S. 502 (1993) that "rejection of the defendant's proffered reasons [for discharge], will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, *no additional proof of discrimination is required.*" 509 U.S. at 511 (emphasis added). In the instant case, there was substantial evidence that Motel 6's reasons for discharge were pretextual. This was sufficient to raise an issue of fact for the jury and permit the jury to conclude the ultimate fact of intentional discrimination.

Petitioner's reliance upon this Court's grant of certiorari in *Reeves v. Sanderson Plumbing Products, Inc.*, No. 99-536, is misplaced. In *Reeves*, the trial court denied a motion for judgment as a matter of law in an age discrimination case, and the jury rendered a verdict in plaintiff's favor. The Fifth Circuit Court of Appeals reversed on the grounds that, although the plaintiff presented sufficient evidence that defendant's proffered reasons for discharge were pretextual, he was required to submit *additional* direct evidence of discriminatory animus. (*Petition for Writ of Certiorari* No. 99536, App. A, p. 8a). The Fifth Circuit thus aligned itself with the minority of circuits that requires "pretext plus" to prove age discrimination.

In the case at bar the trial court *granted* the defendant's renewed motion for judgment as a matter of law based on the same "pretext plus" standard the Fifth Circuit applied in *Reeves*. On appeal, the Ninth Circuit followed the clear holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) that upon rejection of the proffered reasons for discharge, *"no additional proof of discrimination is required."* 509 U.S. at 511 (emphasis added) (citation and internal quotations omitted). *See Motel 6 v.*

Huttinger/Fennern, Petition for a Writ of Certiorari, Pet. App. A, p. 9a (*citing Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) *and St. Mary's Honor Center*, 509 at 511). The Ninth Circuit's interpretation of *St. Mary's Honor Center* is consistent with the majority of circuits. *See Sheridan v. E.I. DuPont De Nemours and Co.*, 100 F.3d 1061 (3rd Cir. 1996) (and numerous cases cited therein), *cert. denied*, 521 U.S. 1129 (1997); and *Combs v. Meadowcraft, Inc.*, 106 F.3d 1519 (11th Cir. 1997) (and numerous cases cited therein), *cert. denied*, 522 U.S. 1045 (1998).

Because the Ninth Circuit's decision in the instant case follows *St. Mary's Honor Center v. Hicks*, no genuine issue of law is here presented. If this Court chooses to reverse *Hicks* and its progeny, and turn the tide of the majority of circuits which are in harmony with *Hicks*, *Reeves* is the case with which to do so, not the case at bench.

C. THE NINTH CIRCUIT COURT OF APPEALS PROPERLY EXERCISED JURISDICTION OVER THE *FENNERN* CASE.

Motel 6 asks this Court to grant certiorari in *Fennern* on jurisdictional grounds, claiming the district court improperly certified the case for appeal because it failed to find a "controlling issue of law" under 28 U.S.C. 1292(b). The district court's analysis is puzzling, but does not preclude the Court of Appeals from exercising jurisdiction. In its Memorandum Decision and Order (Pet. App. D, p. 27a) granting a new trial in *Fennern*, the

district court clearly relied upon the "pretext plus" theory as controlling law in reaching its decision. The district court stated:

> The Fennerns simply did not prove that age discrimination was the "real reason" for their discharge, as they were required to do by the Supreme Court in *St. Mary's* and by the Ninth Circuit's implementation of the *St. Mary's* decision.[22]

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[22] The Court recognizes that the Supreme Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and the Ninth Circuit's decision in *Nidds v. Schindler Elevator Corporation*, 113 F.3d 912 (9th Cir. 1997), suggest that the *prima facie* case, coupled with evidence from which the jury could conclude that the reasons for discharge were pretextual, may be sufficient to defeat summary judgment or a Rule 50(b) motion. However, an alternative, and better view, of those decisions is that the trial court can still assess whether that combination gives rise to a reasonable inference of discrimination which would justify a jury in returning a verdict for the party claiming discrimination. On the other hand, it seems clear that the reasonableness of the jury's inference of discrimination may be properly assessed in the context of a Rule 59 motion for new trial.

Pet. App. D, pp. 62a-63a. In its Order of Certification (Pet. App. C, p. 16a) the district court admitted that the "pretext plus" theory was a legal question about which there is substantial grounds for difference of opinion. Pet. App. C, p. 22a. The district court then denied that it was a "controlling" question, *Id.*, yet granted the Order of Certification. This inconsistency was not lost upon the Court of Appeals, which treated the "pretext plus" issue as a

controlling issue of law. The Court of Appeals stated: "We reject the district court's unsupported 'alternative and better view' for deciding to grant a new trial." Pet. App. A, at 11a.

Motel 6 bases its argument on *In Re Cement Anti-Trust Litigation*, 673 F.2d 1020 (9th Cir. 1982), in which the Ninth Circuit rejected case law from other circuits which defines "controlling questions of law" as including questions which, if resolved on appeal, would "appreciably shorten the time, effort, or expense of conducting a lawsuit . . . " *Id.* at 1027 (*citing Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755-56 (3rd Cir. 1974); *Hadjipateras v. Pacifica, S.A.*, 290 F.2d 697, 702-03 (5th Cir. 1961)). *See also* 16 C. Wright & A. Miller, *Federal Practice and Procedure* § 3929 (1977). Here, although the district court ostensibly did not find that the Fennern appeal presented a "controlling" issue of law, it certified the appeal based on the very considerations that *Katz*, *Hadjipateras*, and *Wright and Miller* hold constitute a controlling issue of law. (Pet. App. C, p. 25a.). Indeed, the Ninth Circuit has itself found a controlling issue of law based upon considerations of time and expense. *See Kay v. Kuehner*, 84 F.3d 316, 139 (9th Cir. 1996) ("We agree with the district court that an order may involve a controlling question of law if it could cause the needless expense and delay of litigating an entire case in a forum that has no power to decide the matter.").

There is no dearth of law to support the Ninth Circuit's implicit conclusion that this case involved a "controlling" question of law. Having clearly concluded that the district court was correct in certifying the appeal, the Ninth Circuit was *required* to affirm that decision,

"although [the district court] relied upon a wrong ground or gave a wrong reason." *Thos. P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (*quoting Helvering v. Gowran*, 302 U.S. 238, 245 (1937)). The Ninth Circuit's conclusion that this appeal presented a controlling question of law could have been based on reasoning similar to that in *Kay v. Kueher, Katz, Hadjipateras*, and *Wright and Miller, supra*. The Ninth Circuit's acceptance of the appeal could also have been based on the conclusion that, the district court's assertion to the contrary notwithstanding, the "pretext plus" issue was the controlling legal question on which the district court's decision turned. Pet. App. D, pp. 62a-63a. In either event, the Ninth Circuit had virtually unfettered discretion to permit or deny the appeal. *See In Re Convertible Rowing Exerciser Patent Litigation*, 903 F.2d 822 (Fed. Cir. 1990); *Gallimore v. Missouri Pac. R.R.*, 635 F.2d 1165, 1168-69 n.4 (5th Cir. 1981); 16 C. Wright & A. Miller, *Federal Practice and Procedure*, § 3929, at 141 (citing S. Rep. No. 2434, 85th Cong. 2d Sess.1958)).

Most importantly, the purpose of the district court's "screening" function has been met here. In describing such purpose, this Court relied upon the following statement from Congress in enacting Section 1292(b):

> . . . Requirement that the Trial Court certify the case as appropriate for appeal serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases . . . [Avoidance] of ill-founded

> applications in the Court of Appeals for piecemeal review is of particular concern. If the consequence of change is to be crowded appellate dockets as well as any substantial number of unjustified delays in the Trial Court, the benefits to be expected from the amendment may well be outweighed by the lost motion of preparation, consideration, and rejection of unwarranted applications for its benefits.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 n.24, 98 S.Ct. 2454, 2461 n.24 (1978) (quoting H.R. Rep. No. 1667, 85th Cong., 2d Sess., 5-6 (1958)).

In the case at bench, the district court was of the clear opinion that immediate appeal of the Fennern case would be of value, and gave a thorough explication of the reasons for its opinion. The Ninth Circuit agreed. The Ninth Circuit, perhaps more than any other circuit, is overburdened and understaffed, but nevertheless granted the petition. It obviously believed that hearing and deciding this appeal was very important, however congested its docket might have been. It would make little sense now to grant certiorari to protect the Ninth Circuit's docket for them, after the Ninth Circuit has already heard the appeal and issued its ruling.

Moreover, Motel 6 failed to raise this jurisdictional issue before the Ninth Circuit panel. The Ninth Circuit always has discretion to determine whether an order granting interlocutory appeal was improvidently granted. *United States Rubber Company v. Wright*, 359 F.2d 784 (9th Cir. 1966). Motel 6 obtained an unfavorable result before the Ninth Circuit and now for the first time raises the

jurisdictional issue. Motel 6 ought not be permitted to benefit from its "dog in the manger" tactics.

D. THE COURT OF APPEALS PROPERLY FOUND THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL ON THE CONSOLIDATION ISSUE.

Motel 6 argues that the Court of Appeals failed to apply an abuse of discretion standard to the district court's finding that the cases were improperly consolidated. Motel 6 is mistaken. At part 2 of its analysis, "New Trial for the Huttingers and the Fennerns," the Court of Appeals clearly stated: "We review for an abuse of discretion a district court's grant of a new trial." Pet. App. A, p. 10a. Further, Motel 6's analysis of the facts is in error. Motel 6 asserts that the similarities between the two cases were inconsequential. Petition for a Writ of Certiorari at p. 24. This is directly contrary to the district court's finding that: "The only area in which the Fennern and the Huttinger cases significantly differ is in Motel 6's proffered reasons for discharge." Pet. App. D, p. 38a.

The flaw in Motel 6's analysis lies in its fixation upon the fact that Motel 6 gave different reasons for discharge of the Fennerns and the Huttingers. The district court mistakenly fixed upon this distinction as well. Pet. App. D, p. 63a. One would hardly expect Motel 6 to use the same reasons for discharge in each case. The relevant similarities between the cases are thus the "same patterns of furtive inspections followed by instant terminations." Pet. App. A, p. 11a. Again, Motel 6 asks this Court to

make a factual review. This is not grounds for granting a writ of certiorari. The Court of Appeals was correct in concluding that the cases were properly consolidated for trial, and that the district court abused its discretion in granting a new trial on this issue.[2]

V. CONCLUSION

Motel 6 bases its request for review on an erroneous view of the facts of record. Motel 6 asks this court to second guess the Ninth Circuit in its determination of the facts from the record. This is not a proper basis for granting a writ of certiorari. Motel 6 identifies no issue worthy of this court's exercise of its discretionary jurisdiction, and the petition should be denied.

DATED this 29th day of December, 1999.

Respectfully submitted,

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[2] A crucial fact which Motel 6 omits is that, at the time plaintiffs withdrew their pattern and practice theory of proof, Motel 6 should have moved to separate the trials. Motel 6 failed to do so because it made a tactical decision to proceed with the trials consolidated. This inconsistent position was not lost upon the Court of Appeals. Although not addressed in the written decision, it was the subject of sharp questioning during oral argument.